

SOUTHERN DISTRICT REPORTERS, P.C. . . .  
(212) 805-0300

1 (Case called)

2 THE DEPUTY CLERK: Counsel, state your name for the  
3 record, beginning with plaintiff.

4 MS. HALLIGAN: Caitlin Halligan for plaintiffs. And  
5 with me, pursuant, with your Honor's permission, to your Rule  
6 3(d) regarding participation by junior attorneys is an  
7 associate at Selendy & Gay, Mitchell Nobel.

8 THE COURT: Okay, Ms. Halligan, Mr. Nobel, thank you  
9 very much.

10 Does that mean that I should be directing my questions  
11 to Mr. Nobel this morning?

12 MS. HALLIGAN: If you would, your Honor. Thank you  
13 very much.

14 THE COURT: I would be happy to do that.

15 Representing the defendants, please. I know there are  
16 several of you. Go ahead.

17 MR. ROCHE: Kyle Roche is here also for plaintiffs.

18 THE COURT: Sir, thank you very much. I did not mean  
19 to ignore you. Thank you.

20 Representing Mr. Fowler today?

21 MR. HEFTER: Your Honor, good morning. This is  
22 Michael Hefter from Hogan Lovells on behalf of Mr. Fowler. And  
23 with me on the telephone, pursuant to your Honor's directives,  
24 is my colleague Samuel Rackear from Hogan Lovells as well.

25 THE COURT: Thank you very much.

1 Are there any other attorneys on the call representing  
2 Mr. Fowler?

3 MR. HEFTER: I don't believe so, your Honor.

4 THE COURT: Thank you. Thank you to both of you for  
5 appearing.

6 Other counsel who would like to make a notice of  
7 appearance? Mr. Lindenbaum?

8 MR. LINDENBAUM: Good morning, your Honor. Matthew  
9 Lindenbaum for Poloniex, LLC. With me dialed in is my partner,  
10 Robert Lindholm.

11 THE COURT: Okay. Good morning to both of you this  
12 morning. Thank you.

13 Mr. Walden.

14 MR. WALDEN: Good morning, Judge. Jim Walden and  
15 Stephanie Levick on the telephone for the iFinex defendants.

16 THE COURT: Thank you so much.

17 I'm looking at the folks whose images are showing up  
18 on my screen right now. Have I omitted anyone? It's not my  
19 intention to do that.

20 MR. CORDING: Good morning, your Honor. Charles  
21 Cording from Wilkie Farr & Gallagher for Defendant Potter.

22 THE COURT: Thank you. Now that you've spoken, you've  
23 actually shown up on my screen.

24 Someone else, please.

25 MS. RUDZIN: Good morning, your Honor. Abby Rudzin

1 from O'Melveny & Myers for Defendant Bittrex, Inc.

2 THE COURT: There you are as well. Thank you.

3 Let me ask you this, Ms. Rudzin, beginning with you:

4 Do you have a horse in this race?

5 MS. RUDZIN: No.

6 THE COURT: Okay. Thank you.

7 Obviously Mr. Hefter does very much have a horse in  
8 the race.

9 Mr. Nobel, perhaps you'll want to be heard as well.

10 Are there other counsel who want to speak to this  
11 particular issue about the motion to withdraw as counsel?

12 MR. WALDEN: For the iFinex defendants, no,  
13 your Honor.

14 THE COURT: Thank you.

15 MR. LINDENBAUM: Your Honor, for Poloniex, the answer  
16 is no as well.

17 THE COURT: Thank you for letting me know.

18 Mr. Hefter, let me turn to you, please, sir, and let  
19 me understand a little bit better than I currently do your  
20 application.

21 It is my understanding that there is a case before  
22 Judge Carter, a criminal case before Judge Carter. And I did  
23 look at the public docket in that case. I saw that there was a  
24 motion filed in early November.

25 The last entry that I saw was an entry regarding a

1 hearing to be held on December 18. And I believe I understand  
2 from Judge Carter's chambers that the motion to withdraw has  
3 been granted.

4 But perhaps I could hear from you as to what you think  
5 I should know and I'm permitted to know about the application  
6 in the criminal case because I do note that it occurred about  
7 two months after your opening brief was filed for the motion to  
8 dismiss in this case and about one month before your  
9 application to withdraw in this case. So I'm trying to  
10 understand the timeline a little bit better.

11 MR. HEFTER: Again, for the record, this is Michael  
12 Hefter from Hogan Lovells, counsel for Mr. Fowler.

13 I want to say at the outset, your Honor, thank you for  
14 moving the conference today. I did have an evidentiary  
15 hearing. I mentioned it to Judge Isgur, Bankruptcy Judge Isgur  
16 in Texas, in Houston, and he appreciated your accommodation.

17 And I also wanted to thank all counsel on the phone  
18 for accommodating my schedule in that regard. I would also  
19 note that the hearing is continuing this afternoon.

20 THE COURT: We'll be sure to be done by the  
21 continuation time of the hearing.

22 MR. HEFTER: Thank you.

23 Just to give you a little sense of the timing, your  
24 Honor, you are correct that Mr. Fowler is a criminal defendant  
25 in a case that's pending before Judge Carter. That case was

brought in or around May of 2019. We were retained to represent Mr. Fowler in connection with that case in October of 2018.

I would also note, your Honor, since we are on a public record, I'm going to refrain from disclosing attorney-client privileged material. As your courtroom deputy also mentioned, it's entirely possible that there are members of the media who may have dialed in.

They have certainly dialed in to the proceedings in front of Judge Carter, and there have been several articles written about Mr. Fowler and his involvement in the criminal proceeding.

In connection with that case, your Honor, as a result of COVID, the trial date in that case had been extended once or twice. I don't recall the specifics of it, but we were scheduled to go to trial earlier in the year.

That date has been pushed back because of COVID and the closing of the Southern District of New York at times, as well as, as your Honor is fully aware, the process for getting cases back at trial.

That being said -- and this is a matter of public record -- Mr. Fowler appeared at a plea hearing. At the plea hearing, the plea fell apart for a variety of reasons, and Judge Carter scheduled the case for trial later in the year.

Your Honor will -- if your Honor looked at the docket,

1 at this point there are several letters that appear on the  
2 docket that we submitted after we filed our motion to withdraw.  
3 And that was pursuant to a process of several conferences  
4 before Judge Carter.

5 After filing the motion, Judge Carter held a  
6 conference to obtain more information. Judge Carter asked us  
7 to prepare an ex parte letter given what we had indicated in  
8 our motion in that case, as well as the motion before  
9 your Honor that there were attorney-client privileged and other  
10 sensitive material that would bear on the application.

11 We had submitted that ex parte to Judge Carter. That  
12 letter -- I don't have the exact date, but my colleague,  
13 Mr. Rackear, may know exactly when that letter was submitted to  
14 Judge Carter.

15 But subsequent to that, Judge Carter issued an order  
16 indicating his at least preliminary views on the motion but  
17 also directed us, as counsel for Mr. Fowler, to provide two  
18 different versions: One, a public version that would be  
19 submitted on the docket, as well as a separate letter that  
20 would be submitted to the United States Attorney's Office which  
21 would exclude attorney-client privileged material but would  
22 include matters that the government was aware of but that  
23 Judge Carter did not believe the public should be aware of.  
24 And we submitted those letters.

25 I would also add that as a result of the process in

1 filing these type of letters in the clerk's office of the  
2 Southern District, it wasn't the easiest thing to do, your  
3 Honor.

4 So it took us a little while to navigate that,  
5 including a requirement for wet signatures on the letters which  
6 caused a slight delay in those letters being put on the docket.  
7 But we had submitted those to Judge Carter and the government  
8 prior to that point in time.

9 The government's response to our motion was required  
10 to be filed on December 8, if I recall correctly. On  
11 December 9, the government put in their response. And in that  
12 response, the government indicated that they were not opposed  
13 to the relief that we were seeking.

14 And then this past Thursday or Friday -- I'm sorry.  
15 Thursday because my conflict also interfered with  
16 Judge Carter's order that we have a hearing on this on Thursday  
17 of last week. So Judge Carter again graciously accommodated my  
18 schedule. We had a hearing on Friday of last week.

19 And during that hearing, Judge Carter granted our  
20 motion to withdraw. I think that the basis for the withdrawal  
21 is laid out fairly clearly in the letters that we had submitted  
22 to the Court, including the one that's currently on the public  
23 docket.

24 THE COURT: Mr. Hefter, when you say the letters  
25 "submitted to the Court," do you mean the letter submitted to



1 Judge Carter or the letters submitted to me?

2 Because the ones submitted to me seemed quite summary  
3 in their description of the difficulties or their bases for the  
4 motion to withdraw.

5 MR. HEFTER: I would assume, your Honor, that  
6 Judge Carter took into consideration the letter that was  
7 submitted to him ex parte as part of his consideration.

8 And I'm not entirely sure of the letter that you're  
9 referencing, your Honor. But if it's the one on the public  
10 docket, the one on the public docket in the criminal matter,  
11 that would be the one that I'm referring to.

12 THE COURT: Mr. Hefter, let me restate what I've just  
13 said.

14 What I'm saying is I learned more, though apparently  
15 not as much as Judge Carter knows, by reading the letters on  
16 the public docket in the criminal case. And I was surprised  
17 that the letter to me wasn't as detailed as the letters in the  
18 criminal case.

19 And I don't have I'm pretty sure the ex parte letter.  
20 So I am trying to figure out the bases for the motion to  
21 withdraw. And I've been told that there are fee issues. But  
22 I've been told as well that there are professional  
23 considerations.

24 I'm not sure if I get to know in this conference what  
25 the professional considerations are or whether that's something

1 you believe would be better addressed in an ex parte submission  
2 or whether it's something else entirely.

3 MR. HEFTER: Well, I believe I am constrained in this  
4 forum, your Honor. But I would also indicate to you that the  
5 primary basis would be the fee issue -- I don't want to mislead  
6 the Court in any way -- which is laid out in the public docket.

7 But to the extent that we did not include the ex parte  
8 submission to your Honor, we apologize for that. That's  
9 certainly something that we can provide to your Honor that  
10 would not include the matters that are redacted on the public  
11 letter.

12 THE COURT: Please understand, sir, that I'm not  
13 really interested in criticizing you. I'm really just trying  
14 to understand what happened.

15 Is it not the case that by September 3 when you filed  
16 your opening brief, the fee issues that came to characterize  
17 the latter portion of your relationship with Mr. Fowler -- they  
18 were there.

19 Because it seemed to me, based on what I was reading  
20 in Judge Carter's docket, that there have been problems  
21 throughout this calendar year and there have been multiple  
22 efforts to obtain clarity from Mr. Fowler as to when and how  
23 your firm and the defense firm in the criminal case would  
24 receive payment.

25 And it seemed that by July, you all knew that it was

1 going to be really difficult. And yet in September, we got the  
2 motion. And I'm not sure why you waited until December on the  
3 eve that the reply brief was due to ask to withdraw.

4 MR. HEFTER: Well, let me address that, your Honor. I  
5 think that there are two questions perhaps embedded in your  
6 question.

7 THE COURT: Okay.

8 MR. HEFTER: And I think that -- again, I think I'm  
9 constrained in what I can say because I believe that there are  
10 aspects of the response to your Honor that would reveal  
11 attorney-client privileged communications between Mr. Fowler  
12 and us as we diligently attempted to seek payment of our fees.

13 But I'm not disagreeing with your Honor on the timing.  
14 I think that there are reasons why we proceeded to file our  
15 motion to dismiss in this case given where we were in our  
16 communications with Mr. Fowler, as well as what we understood  
17 to be the state of play in terms of the trial date in the  
18 criminal matter which at that point in time was scheduled for  
19 January I believe, although it may have been moved.

20 Actually, I'm sorry, your Honor. I think at that  
21 point it had been moved to the spring, but I want to confirm  
22 that before I make any affirmative representation on that point  
23 so your Honor has the actual schedule clear.

24 THE COURT: You said there were two issues embedded in  
25 my question.

1 Do I now have the two issues teed up, sir?

2 MR. HEFTER: The second issue, your Honor, is we filed  
3 our motion to withdraw in the criminal matter on November 9  
4 according to my records, and I believe we filed in the civil  
5 case on December 11.

6 So I think the second question embedded in your  
7 statement is why did we wait for at least that long to file in  
8 the civil action on the eve of the reply. And I think that was  
9 part of your question, your Honor, if I had that correct.

10 THE COURT: It is, yes, especially because it was not  
11 merely a month after filing in the criminal case, but it was  
12 two weeks after Judge Carter issued his decision of November 23  
13 discussing, with a measure of detail, what the issues were.

14 MR. HEFTER: Yes. We were aware of those details as  
15 well, your Honor. I think the response to that, your Honor, is  
16 that we were waiting to see what the ultimate decision in front  
17 of Judge Carter would be but then realized that there were  
18 ongoing proceedings before your Honor and we'd still have the  
19 same basis for withdrawing in the case.

20 So rather than prolong it and wait for a final  
21 decision by Judge Carter, which we didn't know which way it was  
22 going to go one way or the other obviously, we determined to  
23 file in the civil action.

24 THE COURT: Mr. Hefter, there are questions that I may  
25 now be asking you or questions that you may not be able to

1 answer for any number of reasons, but I'll ask them  
2 nonetheless.

3 It is my understanding at this time that Mr. Fowler  
4 has not sought the appointment of counsel under the Criminal  
5 Justice Act.

6 Am I correct so far?

7 MR. HEFTER: You are correct, your Honor. Because it  
8 was a matter of public record in the hearing on Friday,  
9 Mr. Fowler was in appearance virtually. That question was  
10 posed by Judge Carter, and Judge Carter has allowed Mr. Fowler  
11 I believe a 45-day period to obtain counsel.

12 And Judge Carter has also given Mr. Fowler the  
13 opportunity, in the event that he cannot find replacement  
14 counsel, to come back to him for the appointment of CJA  
15 counsel, although it was Mr. Fowler's statement on the record  
16 that he was going to seek replacement counsel.

17 THE COURT: Right now today has he retained someone to  
18 replace your firm?

19 MR. HEFTER: I don't believe so.

20 THE COURT: I am intuiting from Judge Carter's  
21 decision that there may be an issue with certain assets that  
22 Mr. Fowler might otherwise have access to but have been frozen  
23 as a result of the criminal matter.

24 Is that something that you can confirm or deny? I  
25 think there's an asset freeze in place.

1 MR. HEFTER: I think that was part of the -- if you  
2 don't mind, I have the redacted portion of the letter up on  
3 another screen. I don't want to -- if you will just give me a  
4 moment, please.

5 THE COURT: Of course.

6 MR. HEFTER: So the letter, your Honor, that is on the  
7 public docket has a sentence that is partially redacted, but it  
8 does say: "Nevertheless, Mr. Fowler informed us at the time  
9 that the Department of Justice had recently frozen both his,"  
10 and then you can intuit from that --

11 THE COURT: That something got frozen.

12 MR. HEFTER: Yes.

13 THE COURT: What I'm asking, sir -- and this is the  
14 question I can understand if you cannot answer.

15 My prior experience with asset forfeiture included  
16 situations in which the government and criminal defendants  
17 negotiated regarding the unfreezing of certain assets in order  
18 to permit the payment of a criminal defense attorney or, if the  
19 negotiations did not succeed, the conduct of what I knew and  
20 what may still be called *Monsanto* hearings regarding the  
21 unfreezing of assets.

22 If you know, sir, is there a plan in place to either  
23 negotiate with the government or to have some sort of hearing  
24 regarding the unfreezing of assets?

25 MR. HEFTER: I don't believe I can answer that

1 question on the record, your Honor. I'm happy to answer that  
2 question ex parte, but I don't believe I can.

3 THE COURT: Okay. I want to hear from Mr. Nobel in a  
4 moment, sir.

5 Before I do that, what is the plan here?

6 Does Mr. Fowler think that -- is he going pro se in  
7 this matter?

8 MR. HEFTER: Your Honor, I can only tell you that I  
9 believe it's Mr. Fowler's intention to obtain new counsel.

10 THE COURT: In 45 days in the middle of a pandemic  
11 with his assets frozen? Yes.

12 MR. HEFTER: I think that's what his plan is.

13 THE COURT: Okay.

14 MR. HEFTER: I can't tell you, your Honor, the  
15 likelihood of success of that effort.

16 THE COURT: Of course. That's why I'm asking  
17 questions about the unfreezing of assets. I might have a  
18 different view as to his odds if I knew that he and the  
19 government were in negotiations regarding the unfreezing of  
20 assets or whether there would be a hearing scheduled.

21 But if we find ourselves -- you're probably going to  
22 ask me to give the same 45 days that Judge Carter gave him.  
23 I'm not agreeing to do anything yet, just in case for the rest  
24 of you on the call -- but you're going to ask for the same  
25 time.

1           If we find ourselves with nothing, then he's going pro  
2     se in a case -- this is a very complicated case for him to do  
3     pro se I would think. Maybe you're right. Maybe there is  
4     counsel out there who wants to come on board for any number of  
5     reasons. But today, there isn't. He doesn't have someone in  
6     the wings.

7           Correct?

8           MR. HEFTER: I believe that's correct, your Honor.

9           THE COURT: Okay. Did I hear you say, sir, a few  
10    moments ago that the government was not opposed to the relief  
11    sought in the criminal case?

12          I think I was a little bit confused. Perhaps what I  
13    understood them to be saying was that it was fine so long as it  
14    didn't interfere with the trial date.

15          MR. HEFTER: That's accurate, your Honor.

16          THE COURT: Okay. So they were agnostic as to who was  
17    representing him, as long as that person, whoever he or she may  
18    be, was able to proceed in the spring with the set trial date.

19          MR. HEFTER: I believe that's true, your Honor. I'd  
20    want to go back and look exactly at their letter because I do  
21    think it went a little further than that.

22          THE COURT: That's fine. You had said to me they were  
23    not opposed. I wasn't sure I had read that from their  
24    submission. But that's fine. We can both look back at the  
25    letters at a different time. Thank you, sir.



1 Let me turn now to Mr. Nobel.

2 Mr. Nobel, I hope that when you start speaking, that  
3 you're going to show up on my screen. Why don't you begin  
4 talking, and then I'll hopefully see you pop up somewhere.

5 MR. NOBEL: Thank you, your Honor. I hope I pop up as  
6 well. Mitchell Nobel for the plaintiffs.

7 THE COURT: There you are. Yes.

8 Sir, what is plaintiffs' position with respect to this  
9 application and then please tell me why.

10 MR. NOBEL: Plaintiffs take no position on the merits  
11 of Mr. Fowler's counsel's motion to withdraw. But plaintiffs  
12 would request that resolution of the motion be deferred until  
13 after oral argument on the motion to dismiss, if the Court is  
14 inclined to hear oral argument on those motions.

15 And we ask that just to avoid any undue delay in this  
16 case. Undue delay has been recognized consistently by courts  
17 in this district as an appropriate consideration in evaluating  
18 motions to withdraw and courts, when faced with a situation  
19 like this one where a party moves to withdraw after briefing is  
20 completed on a motion to dismiss and prior to oral argument  
21 have deferred the resolution of the motion to withdraw until  
22 after oral argument in order to avoid delay.

23 THE COURT: Excuse me, Mr. Nobel.

24 Is it not the case that briefing hasn't concluded?  
25 That's the point. I was waiting for reply briefing, and I

1 don't think Mr. Hefter is going to waive on his client's behalf  
2 his right to submit a reply brief in the motion to dismiss.

3 So that's for me the bigger issue, is that I've got  
4 and you have a reply brief I believe as to the other defendants  
5 in the case and we don't have one as to Mr. Fowler.

6 So I would imagine your argument is that if I let them  
7 off now, we're going to have a delay of at least 45 days, and I  
8 would suspect that new counsel wouldn't be ready immediately to  
9 jump in and file a reply brief. So can we talk about that.

10 MR. NOBEL: Yes. Of course, your Honor.

11 From plaintiffs' perspective, as of the 17th when  
12 Mr. Fowler's reply brief was due under the extension he  
13 requested and received, he was represented by counsel, and  
14 there was no brief filed.

15 So from plaintiffs' perspective, that's generally the  
16 conclusion of briefing. The decision to not file on the 17th  
17 was presumably a reflection of Mr. Fowler and his counsel who  
18 was without question representing him at that time, their legal  
19 judgment as to the necessity of a reply. There has been no  
20 request for a further extension either before that deadline  
21 passed or subsequent that the plaintiffs have seen.

22 So as far as plaintiffs are concerned, the deadline  
23 has past, and no one has requested an extension. If Mr. Fowler  
24 or his counsel is now seeking to request an extension,  
25 plaintiffs would oppose that request.

1 Plaintiffs also agree that granting the motion to  
2 withdraw here creates a risk of delay for that reason as well.

3 THE COURT: Stay right there, Mr. Nobel.

4 Mr. Hefter, if I were to grant your motion, which,  
5 again, I'm not making any decisions at this second, is there a  
6 concurrent request for an extension on the reply briefing?

7 Or is your client foregoing a reply briefing?

8 MR. HEFTER: No. I don't believe I have the authority  
9 to say that he is foregoing reply briefing, your Honor, at this  
10 point in time. So I gather we are, on behalf of Mr. Fowler,  
11 even though we believe that we should be relieved of our  
12 obligation in this case, that he should have an opportunity to  
13 put in a reply brief.

14 THE COURT: Okay.

15 MR. HEFTER: Subject to his determination as to  
16 whether he wants to waive it, but I'm not sure that he would  
17 want to do that without consulting with counsel.

18 THE COURT: To Mr. Nobel's point then, I understood,  
19 Mr. Hefter, you to be asking on behalf of the attorneys  
20 representing Mr. Fowler to be relieved before having to submit  
21 a reply brief.

22 Now, if you're saying actually, no, Failla. We'll  
23 submit the reply brief, and then we want out before oral  
24 argument or before its resolution, then I would just like to  
25 know that.

1           If you could just perhaps help me and perhaps help  
2 Mr. Nobel understand what is the time frame.

3           What responsibilities are you continuing to accept,  
4 and which ones would you prefer to defer to new counsel, if new  
5 counsel is secured?

6           MR. HEFTER: We would want your Honor to defer,  
7 subject to your permission obviously, to defer all of it at  
8 this point, given the -- let me be very clear about this.

9           THE COURT: Yes.

10          MR. HEFTER: Given the substantial amount of fees that  
11 Mr. Fowler has not paid, having us continue on that basis is  
12 not only untenable but I believe is grounds for withdrawal now.

13          THE COURT: I understand that. Mr. Nobel and I are  
14 going to have that discussion in just a moment. I don't want  
15 you to think that I am unmindful of how much in arrears your  
16 client may be.

17          The fact that I work for the government doesn't mean  
18 that I don't understand the significance of clients paying the  
19 fees that are incurred and the attorney's fees that are  
20 incurred, because your firm is not, at least in this matter,  
21 doing this pro bono. I completely understand that. So please,  
22 please understand that I do understand that.

23          But the issue becomes I'm here in this case. I've got  
24 a bunch of motions to dismiss. I need one more briefing before  
25 I can really start thinking about them.

1 And you're asking me -- maybe you're just asking me to  
2 do this, to wait and to let somebody else come in, get up to  
3 speed, and file the reply brief in the case.

4 MR. HEFTER: Well, that's your decision obviously,  
5 whether we are required to file the reply brief, in which case  
6 you would have all of the briefs sub judice.

7 At the very least, we would not want -- if your Honor  
8 were to order us to continue through the briefing, we wouldn't  
9 want that to be with prejudice to our motion to withdraw or any  
10 implicit acceptance or waiver of any of our arguments that we  
11 actually undertook another piece of work pro bono.

12 THE COURT: Of course. If we were in that position,  
13 I'd order you -- the question is whether I should, and  
14 Mr. Nobel and I will talk about that momentarily.

15 Mr. Hefter, I'm going to ask a question with my  
16 characteristic lack of diplomacy.

17 If what you're telling me is you don't want to file  
18 the reply brief because your client is so deep in the hole that  
19 it's really getting to the point of being ridiculous, I will  
20 listen to you, and Mr. Nobel and I will have that discussion.

21 If you're saying that you don't want to file this  
22 reply brief because there are other things in this relationship  
23 that you'd like me to know about in a more ex parte  
24 communication and that that's also something I really do need  
25 to consider and it's not just the fees, then please let me know

1 because I think Mr. Nobel and I need to have that discussion as  
2 well.

3 MR. HEFTER: Your Honor, I think the primary issue is  
4 the fees issue.

5 THE COURT: I really do appreciate your candor on that  
6 point, sir, because I've had other attorneys who find all sorts  
7 of professional conflicts that transcend the monetary.

8 MR. HEFTER: If I may, your Honor.

9 THE COURT: Of course, sir.

10 MR. HEFTER: On that point, of course this would not  
11 be for public consumption on the record but certainly would be  
12 something for your Honor to consider if your Honor would want  
13 ex parte communications, the nature of the discussions between  
14 us and Mr. Fowler -- it would indicate a robust discussion  
15 around these issues, and I'll leave it at that.

16 THE COURT: I appreciate that, sir. Thank you again  
17 for the candor.

18 Mr. Nobel, the playing field has sort of been set up  
19 for us now based on the conversations I've just had with  
20 Mr. Hefter. They want an extension. They don't want to forego  
21 reply briefing. They would prefer that someone else did the  
22 reply briefing.

23 Let's imagine that there are substantial billings that  
24 have accrued and have not been paid. So I don't wish to be  
25 Grinch-like during this season, but let's talk about your

1 client's concerns in the face of what Mr. Hefter has just said  
2 to us.

3 MR. NOBEL: Thank you, your Honor.

4 Based on Mr. Hefter's representations, plaintiffs  
5 would oppose any extension for reply briefing. An extension,  
6 particularly a second extension that's requested after the  
7 deadline, should only be granted if there is good cause.  
8 Mr. Fowler and his counsel have not provided any reason why a  
9 brief wasn't filed on the 17th.

10 On the 17th, Mr. Fowler was represented by capable  
11 counsel who was familiar with all the issues in this case. We  
12 haven't heard anything at all suggesting that they couldn't  
13 have filed a reply brief at that time.

14 In fact, Mr. Fowler's counsel requested the extension  
15 that set that deadline that they then failed to meet. So there  
16 has been no cause at all, let alone good cause, for why that  
17 reply brief deadline wasn't met.

18 THE COURT: Mr. Nobel, please excuse me. I'm going to  
19 push back just a little bit.

20 In the letter of December 2 asking for the extension,  
21 there was a hint that there might be a forthcoming motion to  
22 withdraw.

23 Am I correct?

24 MR. NOBEL: You're correct, your Honor.

25 THE COURT: And in fact, they filed the motion to

1 withdraw on the 11th of December, which I get was not the 17th  
2 of December. But you and I could imagine that the filing of  
3 the motion to withdraw was designed to just sort of stop the  
4 bleeding in terms of billings at this time and to tell us we  
5 need to get new counsel in. We've gotten to the point where we  
6 need to do something.

7 So I understand what you're saying, that there was no  
8 second extension requested of me, and you would have opposed it  
9 for the very reasons that you've just articulated.

10 I think it may be a little too cute to say that  
11 they're done now -- they've lost their opportunity -- because I  
12 think I was supposed to -- and I did in fact -- interpret the  
13 motion to withdraw as a request as well that they not be  
14 required to file the reply brief.

15 And from that, I understood that their hope was that  
16 somebody else would do it. But you may think otherwise. So  
17 let me hear from you.

18 MR. NOBEL: That's fair, your Honor. Treating the  
19 December 2 or the December 11 -- either the December 2 request  
20 for an extension or the December 11 motion to withdraw as sort  
21 of a request that the clock on their reply brief be stopped in  
22 some way, accepting that construction, plaintiffs still think  
23 that any sort of substantial extension here like what it seems  
24 that Mr. Fowler's counsel is requesting on his behalf, is  
25 inappropriate.



1 As the Court indicated, these issues that are driving  
2 the motion to withdraw and therefore driving the request for a  
3 second extension are not sudden or unanticipated. They've been  
4 on the horizon for Mr. Fowler and his counsel for months, maybe  
5 years. Mr. Fowler in the motion to withdraw indicates that  
6 they've been discussing the possible need to withdraw since  
7 February of this year.

8 So in light of that, when Mr. Fowler agreed to a  
9 briefing schedule that gave them six months after the amended  
10 complaint before the briefing concluded, almost seven months,  
11 and then requested a second extension, filed the opening brief,  
12 the opening motion to dismiss -- at any time of these times,  
13 the issues that were driving this were visible. If they had  
14 been raised more promptly, there wouldn't be the delay that  
15 we're looking at.

16 Instead, it really is the 11th hour when Mr. Fowler's  
17 counsel is coming asking to withdraw and to then delay  
18 everything else while Mr. Fowler hopes to obtain counsel.

19 And as your Honor has indicated, that might be a  
20 daunting prospect for Mr. Fowler. So the delay that could be  
21 caused by this request for an extension could be very  
22 substantial.

23 THE COURT: Mr. Nobel, have you had occasion to look  
24 at any entries in Judge Carter's case?

25 MR. NOBEL: Yes. We have reviewed the public entries,

1 but we of course have not had any access to the ex parte  
2 materials or the redacted.

3 THE COURT: You and me both, sir. Thank you very  
4 much.

5 The reason for my asking is I went and looked at what  
6 I guess is the public version of counsel's letter, which, as  
7 you and I know, is quite heavily redacted. Even with those  
8 redactions, I thought that there were a lot of dates that  
9 weren't redacted.

10 From that I could imagine that this wasn't a situation  
11 where Mr. Fowler's counsel never spoke with their client about  
12 the need to keep current on billings. And it looked like those  
13 were pretty constant discussions from February to now.

14 And I say that, sir, because I was wondering -- and  
15 perhaps you were as well -- whether there was some detente that  
16 was reached between February and December or November that just  
17 suddenly became unraveled.

18 But it does look like there was a fairly constant  
19 stream of discussion about getting paid or getting payment  
20 from February through July and then probably into the fall.

21 You've seen that as well, sir; correct?

22 MR. NOBEL: Yes. That is correct.

23 THE COURT: What do you think I should do with that?

24 Here's what I mean by that. That's a pretty  
25 open-ended question. So let me try and give you a better one.

1 On the one hand, it does show diligence. It does show  
2 diligence, that they were trying to make this work and trying  
3 to represent their client in two cases where the client needed  
4 their representation.

5 On the other hand, I suppose you could argue that they  
6 should have figured out somewhere in July that this wasn't  
7 going to happen and that they should have planned accordingly.

8 That is at that fork in the road that I find myself,  
9 sir. So let me hear, sir, arguments on that point.

10 MR. NOBEL: Yes. Thank you, your Honor.

11 Plaintiffs' view is that your Honor is of course  
12 correct. Plaintiffs don't mean to imply that Mr. Fowler's  
13 counsel has been anything other than diligent in their attempts  
14 to work out the relationship or not. As plaintiffs said, we're  
15 not taking any position on the merits of the ultimate motion to  
16 withdraw.

17 But in terms of the timing, plaintiffs do feel that  
18 the length of time for which these issues have been visible to  
19 Mr. Fowler and his counsel suggests that their resolution  
20 shouldn't delay all of the motions to dismiss here.

21 In particular, by the time they filed their motion to  
22 withdraw before Judge Carter which was back in November, it  
23 seems hard to believe that Mr. Fowler and his counsel couldn't  
24 have understood that they would ultimately need to withdraw in  
25 this matter as well.

1 And if they had so moved back in November and had this  
2 issue been resolved in November, the delay in bringing in new  
3 counsel, getting them up to speed, and filing the reply brief  
4 might have been much more limited. It might not have delayed  
5 anything at all. It might have only been a small delay.

6 But by waiting until the reply briefs are essentially  
7 due to make this request, Mr. Fowler and his counsel have put  
8 the Court and the parties in a position where the delay that --  
9 the only delay they could be requesting is a very substantial  
10 one. And we do think that should ultimately be put at the feet  
11 of Mr. Fowler and his counsel.

12 THE COURT: Mr. Nobel, I'm going to return to  
13 Mr. Hefter for his thoughts in reply. I don't want to deprive  
14 you of any other arguments. You've been answering my  
15 questions, and I really do appreciate that. If there are other  
16 arguments that you want to make in response to questions I  
17 haven't asked you, now is your chance.

18 MR. NOBEL: No. That's everything, unless there is  
19 anything further from the Court.

20 THE COURT: It is, unless my discussions with  
21 Mr. Hefter disclose anything. Thank you very much.

22 Mr. Hefter, I'll hear from you on reply.

23 MR. HEFTER: Yes, your Honor. So I'll pick up on  
24 Mr. Nobel's comment that if we had disclosed this in November,  
25 there would have been a substantial delay in any event.

1           So what I heard him saying is that the delay would  
2           have been shorter. But that doesn't take into consideration  
3           facts and boots on the ground, your Honor, in dealing with an  
4           incredibly sensitive situation.

5           I do want to make a point about whether this case was  
6           standing alone or standing next to a previously filed criminal  
7           indictment. And I think that's highly relevant to this  
8           discussion, your Honor, because I'm not suggesting that counsel  
9           is saying this. But it was not a situation in July where we  
10          had information and all of a sudden we were just going to throw  
11          up our hands.

12          This is a gentleman who faces a significant indictment  
13          in the Southern District of New York. We've been working on  
14          the case for quite some time. And doing that, in just saying,  
15          well, we're not getting paid our fees. So we're just going to  
16          drop the client is just not something that ever crossed our  
17          mind. And this gets into discussions I believe that are not  
18          appropriate for the public docket, your Honor.

19          So looking at the record cold -- and, again, I  
20          apologize to the Court for not including our letter to  
21          Judge Carter. But looking at the record cold, if you look at  
22          the situation from July to November or whatever it is and you  
23          look at the number of communications that are disclosed in the  
24          letter, it was a very sensitive thing for our firm to consider  
25          as we proceeded to determine the best way of dealing with

1 Mr. Fowler's criminal representation.

2 I don't think we were in a position to say, well, you  
3 need to tell the plaintiffs in the civil matter that we need to  
4 withdraw because that would have sent a message to the  
5 government that also -- I'll leave it at that, your Honor.

6 THE COURT: Leave it at that. I can finish that  
7 sentence myself. Thank you.

8 MR. HEFTER: Yes.

9 THE COURT: All right. Other things you'd like me to  
10 know, sir?

11 MR. HEFTER: No, your Honor.

12 THE COURT: All right. Mr. Hefter, I would like to  
13 see the ex parte submission. Let me turn back to Mr. Nobel for  
14 a moment.

15 Mr. Nobel, may I imagine, sir, that you have no  
16 objection if Mr. Hefter were to send to me either what was sent  
17 to Judge Carter, just to save him the trouble of having to  
18 re-do it or something that was perhaps -- if he wants to retool  
19 it for me, that's fine too.

20 But you would have no problem with my getting an ex  
21 parte submission?

22 MR. NOBEL: The plaintiffs object to an ex parte  
23 submission. However, plaintiffs would request that -- I  
24 believe Mr. Hefter indicated that he prepared something that  
25 was perhaps less redacted than the public version but still

1 more redacted than what judge Carter received. It may be  
2 that's not appropriate here.

3 THE COURT: I understood that to be, sir, something  
4 that was submitted to the U.S. Attorney's Office because it  
5 made reference to information in their possession which we  
6 don't have. So I think we have the public information which  
7 you and I have both read. I'd like to see the ex parte  
8 submission.

9 Do you have an objection to that, sir?

10 MR. NOBEL: Plaintiffs don't object to that.

11 THE COURT: Mr. Hefter, do you feel comfortable  
12 sending me what you sent to Judge Carter?

13 Or do you think you'd need to retool it to make it  
14 less focused on the criminal case?

15 I think I could handle seeing what was sent to him and  
16 it would save you the trouble of retooling the letter, but I'll  
17 leave it to you.

18 MR. HEFTER: I believe we can do that, your Honor. I  
19 would want to take one more read through it before submitting  
20 it to chambers, but I don't believe that's going to be a  
21 problem.

22 THE COURT: May I have that by tomorrow, sir?

23 MR. HEFTER: Yes, your Honor.

24 THE COURT: I think I need to see it before I make a  
25 final decision, but I imagine I'll be entering either a written

1 endorsement or a written order, although I appreciate each of  
2 you participating.

3 This was my first conference with Microsoft Teams,  
4 other than an internal one with my clerks and my deputies. So  
5 you were my betas today, and I really do appreciate it.

6 Mr. Nobel and Mr. Hefter, thank you very much for a  
7 very well-presented argument.

8 Is there anyone else who wishes to speak to me at this  
9 time?

10 I don't mean to cut anyone off, but I do think for me  
11 the information I need is going to be in a letter that I have  
12 not yet received.

13 Seeing no one and hearing no one, I will adjourn the  
14 conference at this time. I'm going to wish to each of you  
15 safety and good health during this pandemic. I'm going to wish  
16 you as well a very happy holiday season, a very happy New Year.

17 I really do look forward to the day when we can back  
18 in the courtroom, rather than doing it through these  
19 videoconferences. As much as I enjoy seeing your homes and  
20 your offices, I really would much prefer to have you with me.  
21 So be well, everyone. Thank you very much.

22 (Adjourned)  
23  
24  
25